Joseph Magnin Company, Inc. *and* **Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO.** Case 20CA-14321

August 10, 1981

DECISION AND ORDER

On December 16, 1980, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs; Respondent filed a brief in answer to the exceptions of the General Counsel and the Charging Party; and the Charging Party filed a brief in answer to Respondent's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and conclusions[2] of the Administrative Law Judge but to modify his recommended Order consistent with the additional remedy granted herein.

The Administrative Law Judge concluded, and we agree, that Respondent violated Section 8(a)(3) and (1) of the Act by prohibiting the transfer of hourly paid employees to its newly opened Gucci specialty store on Post Street from stores at which these employees were represented by the Union pursuant to the terms of a collective-bargaining agreement. The Administrative Law Judge found that Respondent's refusal to permit the transfer of union members was motivated by a desire to prevent the Union from gaining majority status at the new store. Nevertheless, he dismissed the General Counsel's allegation that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union because the evidence did not establish that the Union had obtained an actual majority at Post Street and because the number of identifiable discriminatees was not sufficient to demonstrate conclusively that the Union would have obtained majority status had the unfair labor practices not been committed. Both the General Counsel and the Charging Party have filed an exception, arguing that a bargaining order is an appropriate and necessary remedy for Respondent's violation of the Act and that the record is sufficient to establish the Union's entitlement to a legal presumption of majority status as of October 1978. While we disagree with the General Counsel and the Charging Party that a nonmajority bargaining order is an appropriate remedy in this case, we find that the recommended Order of the Administrative Law Judge falls short of the relief to which the Charging Party is entitled.

At the time Respondent opened its store on Post Street, the employees in all its other San Francisco stores were represented by the Union in a single bargaining unit. During a bargaining relationship of 30 or more years, Respondent and the Union have routinely included in their collective-bargaining agreements an after-acquired-stores clause designating the Union as the exclusive collective-bargaining agent for the employees in all of Respondent's San Francisco stores. Pursuant to this clause, Respondent has in most cases[3] voluntarily recognized the Union whenever it opened a new store in San Francisco. At the time this dispute arose, the bargaining unit was comprised of approximately 200 employees of Respondent's 4 retail stores in San Francisco and approximately 300 employees of Respondent's headquarters on Harrison Street.

In *Houston Division of the Kroger Co.*,[4] the Board concluded that a contractual clause such as the one by which Respondent is bound constitutes a waiver of an employer's right to insist upon a Board-conducted election when faced with a demand for recognition but that it does not relieve a union of its obligation to provide the employer with proof of its majority status among the employees in the group to be added to the existing unit. By this interpretation of after-acquired-stores provisions, the Board allows parties as much freedom as possible to structure their bargaining relationship through

[1] At the hearing, the Charging Party moved to defer resolution of the 8(a)(3) allegation to the decision of Arbitrator Grodin rendered on July 16, 1979. Both Respondent and the General Counsel opposed the motion. Without ruling formally on the Charging Party's motion to defer, the Administrative Law Judge formed independent conclusions concerning the discrimination issue, although in so doing he found the arbitrator's decision entitled to great weight. Citing *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Charging Party has renewed before the Board its motion to defer, in the form of an exception to the Decision of the Administrative Law Judge. After careful consideration of the record and briefs, including the record in the arbitration proceeding, we are of the opinion that deferral is inappropriate in this case. Arbitrator Grodin was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay for the employees denied transfers by Respondent. See *Triple A Machine Shop, Inc.*, 245 NLRB 136 (1979). We therefore hereby deny the Charging Party's motion to defer to the arbitrator's award, and we uphold the ruling of the Administrative Law Judge.

[2] We adopt the conclusion of the Administrative Law Judge that Respondent violated Sec. 8(a)(1) and (3) of the Act by discriminating with respect to transfer and employment opportunities at its new Post Street store on the basis of union membership. In so doing, however, we do not rely on the Administrative Law Judge's discussion of the Embarcadero situation at sec. 4, par. 6, to the extent that he appeared to find independent violations of the Act based on events which occurred outside the statutory 10(b) period. We agree with the Administrative Law Judge's analysis of the events that occurred when the Embarcadero store was opened, however, insofar as they provide only background evidence for the violation found in the instant case.

[3] The sole exception to the pattern of voluntary recognition occurred at the Embarcadero store, at which the Union subsequently won a Board-conducted election.

[4] 219 NLRB 388 (1975).

negotiations without permitting them to deny to affected employees the statutory right to select or reject a bargaining representative. Under usual circumstances, therefore, Respondent's statutory duty to recognize the Union as the representative of the Gucci store employees and to apply the current collective-bargaining agreement to the new operation would have arisen only if the Union presented it with concrete evidence of support by a majority of the Gucci store employees.

The circumstances of this case are not usual, however. Here, Respondent carefully considered the financial advantages of escaping its contractual obligations to the Union and to the unionized employees if it could prevent the Union from gaining majority support at the new Gucci store. Having determined the desirability of reducing commissions and labor costs, Respondent deliberately embarked on a course of conduct designed to forestall union presence at the new facility and thus to avoid application of the agreed-upon wage and benefit structure.[5] In this campaign Respondent was entirely successful. It refused to transfer union members to the Post Street store and, by requiring that members of the bargaining unit quit their jobs before even making application for jobs at the new store, so discouraged application that at this point it is not possible to determine precisely how many employees would have sought transfers had the quit-and-reapply requirement not been imposed.[6] We are thus faced with a situation in which the traditional redress recommended by the Administrative Law Judge does not remedy all the unfair labor practices committed by Respondent and does not restore the *status quo ante*. As the agency entrusted with administration of the Act we cannot sanction a party's attempt to avoid contractual obligations lawfully undertaken when the method of avoidance constitutes an independent unfair labor practice. Nor should we place unnecessary restrictions upon our authority to remedy serious violations of the Act, since failure to grant appropriate relief not only leaves injured parties without redress but also encourages more violations of the same nature. We therefore conclude that Respondent must be required to reconstruct the first day of its operation of the Post Street store as it would have occurred absent Respondent's unlawful conduct. To that end, we shall require Respondent to transfer immediately to the Gucci shop on Post Street all employees who applied for transfer and were rejected because of their union affiliation, as well as all employees who were discouraged from applying for transfer because of their union affiliation, terminating employees presently employed at Post Street, if necessary, to provide jobs for the transferees. In addition, solely for the purpose of remedying a past course of unlawful conduct, we shall assume that, on the first day the Post Street store opened for business, had Respondent committed no unfair labor practices, the Union would have represented a majority of the Post Street employees and the contract between the parties would have applied. Therefore we shall require that the backpay due the transferees be computed on the basis of the contractual wage and benefit structure that would have been in effect had Respondent not prevented the Union from gaining a majority in the Post Street store.[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Joseph Magnin Company, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to transfer hourly employees to other of its departments, stores, or other facilities because those employees are members of Department Store Employees Union, United Food and Commercial Workers International Union, Local 1100, AFL-CIO, or any other labor organization.

(b) Telling hourly employees that they must resign their present positions in order to effect a transfer to any of its other departments, stores, or facilities because these employees are members of the Union.

(c) In any like or related manner discriminating against employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

[5] When the Post Street store opened without a majority of union members in the employee complement, Respondent unilaterally changed the wage structure from the salary-plus-incentive-bonus system mandated by the collective-bargaining agreement to a commission-against-draw system.

[6] We note that the evidence adduced at the hearing establishes that Respondent's discriminatory policy was well publicized among the employees affected by it.

[7] In fashioning such a retrospective remedy, we expressly decline to order that Respondent apply the contract *in futuro* or that it recognize and bargain with the Union in the absence of a demonstration of majority support.

(a) Rescind any personnel policy prohibiting the interstore or intrastore transfer of hourly employees which is designed and intended to discriminate against such employees because of their membership in or activities on behalf of the Union.

(b) Immediately transfer to its Gucci store at 253 Post Street, San Francisco, California, any employees found to have been discriminated against because of union membership either by being denied transfer opportunities or by being discouraged from applying for transfer, discharging if necessary any employees now filling the positions to which the discriminatees are to be transferred, and make them whole in the manner set forth in that section of the Administrative Law Judge's Decision entitled "The Remedy," as modified herein.

(c) Preserve and make available to the Board or its agents all payroll and other records necessary to determine the transfer rights and to compute the backpay rights set forth herein and in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(d) Post at its San Francisco, California, facilities copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Joseph Magnin Company, Inc., to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT prevent hourly employees from interstore or intrastore transfers because they are members of Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT tell hourly employees that they must resign from their current positions before they may transfer to another of our stores, departments, or facilities because they are members of the Union.

WE WILL NOT in any like or related manner discriminate against employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of the Union, or any other labor organization, or for engaging in activity protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any right guaranteed them by Section 7 of the Act.

WE WILL rescind any personnel policy prohibiting the interstore or intrastore transfer of hourly employees which is intended to discriminate against employees because of their membership in or activities on behalf of the Union.

WE WILL immediately transfer to our Gucci store at 253 Post Street, San Francisco, California, any employees found to have been discriminated against because of their union membership, discharging if necessary any employees now holding positions to which such discriminatees are entitled.

We will make the aforementioned discriminatees whole with interest for any losses they may have suffered by reason of the discrimination practiced against them.

JOSEPH MAGNIN COMPANY, INC.

DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard in San Francisco, California, on August 27 and 28, 1980, pursuant to a complaint issued by the Acting Regional Director for Region 20 on December 18, 1979. The complaint is based on a charge filed on January 10, 1979, and an amended charge filed on November 1, 1979, by Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO (hereinafter the Union or the Charging Party). The complaint alleges that Joseph Magnin Company, Inc. (hereinafter Respond-

ent)[1] has engaged in and is engaging in unfair labor practices violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (29 U.S.C. §151, *et seq.*) (hereinafter called the Act).

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs have been received from the General Counsel, Respondent, and the Charging Party.

Upon the entire record in the case, from my observation of the demeanor of the witnesses, and after careful consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Joseph Magnin Company, Inc., has been since January 1, 1978, a corporate division under the ownership of New Magnin, a Delaware corporation. Respondent now has and at all times material herein has had its principal place of business in San Francisco, California, from which it operates a chain of department stores under the name of Joseph Magnin and a chain of stores under the name of Gucci which is engaged in the retail sale of products manufactured by the family of that well-known Italian designer. In the normal course and conduct of these operations during the past fiscal year, Respondent derived gross revenues in excess of $500,000 and purchased products valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, I find, as admitted in the answer, that Respondent is and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

1. Did Respondent Joseph Magnin Company, Inc., violate Section 8(a)(3) and (1) of the Act by prohibiting the transfer of its hourly paid department store employees to a new "freestanding" Gucci store on Post Street in San Francisco (which store is owned and operated by Respondent) because said hourly employees joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage such activities?

2. Did Respondent violate Section (a)(5) and (1) of the Act by refusing to recognize the Union as the collective-bargaining representative of employees at Respondent's Post Street Gucci store?

3. Did the alleged unlawful acts of Respondent under Section 8(a)(3) prevent the Union from acquiring a majority at the Post Street Gucci store? Is a bargaining order an appropriate remedy in such a situation?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(3) Allegations*

1. Background: The Embarcadero opening and the no-transfer policy

A somewhat lengthy historical analysis is relevant and necessary to a thorough understanding of the events and issues raised in the instant matter.

Respondent and the Union have been signatories to successive collective-bargaining agreements for some 30 years or more. Each of those agreements (including those applicable to the events in the instant case, *viz*, the agreements covering the periods 1975-78 and 1978-81, respectively) contains the following clause which lies at the bottom of this dispute:

> *Section 1. Recognition*
>
> The Union is recognized as the sole collective-bargaining agent for all employees employed at the San Francisco stores of Joseph Magnin except for executives as defined in Section 2 (Definition of Executives) and for the classifications listed in Appendix A.

The General Counsel and the Union contend that section 1 of the agreement is a valid "after-acquired-stores" clause under applicable Board precedent; and it appears that, at least until the opening of its Embarcadero store in early 1977, Respondent construed section 1 in the same fashion, and extended recognition to the Union when it opened new stores in San Francisco during the 1960's and early 1970's. When Respondent opened its Embarcadero store on February 10, 1977, however, it refused to extend the contract and recognize the Union and instead filed a petition for an election. The Union then filed an unfair labor practice charge with the Board alleging violations of Section 8(a)(1), (3), and (5). That charge was premised on allegations that Respondent unlawfully withheld recognition and that Respondent had refused to hire union members to staff the Embarcadero store or to permit the transfer of hourly employees from its other San Francisco stores (all of such employees' being union members under the collective-bargaining agreement's union-shop provisions) to the Embarcadero store. The charge was dismissed following Region 20's investigation and, on appeal to the General Counsel, that dismissal was upheld; the Board then conducted an election at the Embarcadero store, which the Union won.

The aspect of the Embarcadero events particularly relevant herein is Respondent's refusal to transfer hourly employees from its other San Francisco stores to the new Embarcadero store. Respondent asserts that it has a "longstanding" policy against the transfer of hourly em-

[1] The complaint and the other formal documents in this case set forth the name of Respondent as Joseph Magnin d/b/a Gucci Shop. While no formal motions were made to do so, I have amended Respondent's name herein to reflect the true name of Respondent as set forth in its answer to the complaint.

ployees from one store to another; the one general exception is an employee's "relocation" from one geographic area to another, but Respondent has also permitted transfers in what it deems "special circumstances"—e.g., a job promotion. Respondent asserts that this no-transfer policy applies to all of its hourly employees in all of its stores, which the record shows are located in various cities in California, Nevada, and Hawaii.

Four of Respondent's top management personnel testified to the existence of Respondent's policy of not permitting the transfer of hourly paid employees from one store to another. The policy was justified on two major grounds: It was designed to promote the development of a personal "book" of clients by each salesperson, and it was designed to prevent raiding, i.e., stealing away of productive sales employees by jealous store managers, as well as to prevent the dumping of unproductive employees into other stores by disgruntled store managers.

Elsa Lane, who was hired as Respondent's director of employee relations in March 1978, testified that Respondent's no-transfer policy existed in writing at the time of her hire and that she assumed that it had existed prior to 1977. Michael Raskin, who joined Respondent as its president in February 1978 but who has since left the Company, testified that he learned of the no-transfer policy in the spring of 1978 and that he was told that the policy had existed for some time. Harmon Tobler, who joined Respondent as a vice president in September 1978 and who is now its president, testified that shortly after he joined the Company he learned of the no-transfer policy from Elsa Lane. These executives each testified as to the original or current justifications for the no-transfer rule, such justifications being those recited above. Tobler testified that he "was brought to Joseph Magnin" to develop the personal clientele concept for Respondent's salespeople; he further testified that "a major plank in the program that I brought to Joseph Magnin" was retaining salespeople in the stores where they were, rather than permitting transfers. Respondent introduced in evidence a copy of its written no-transfer rule (Resp. Exh. 5); that excerpt from its policy manual is dated "9/26/77."

Michael Richards also testified about Respondent's no-transfer policy. Richards is the current manager of Respondent's Montgomery Street store in San Francisco. He has been a store manager since January 1975, and has managed two stores in addition to the one on Montgomery Street. Richards testified that Respondent's no-transfer policy existed in writing when he became a store manager in January 1975, and he also testified that "it said in 1975 that an employee to be transferred from one branch to another, there should be a specific reason for the transfer and a job available, based upon qualifications and openings."

This recitation of the facts raises several considerations which went unanswered at the hearing. The Union did not learn of any policy prohibiting transfers until the opening of the Embarcadero store, and it contested the application of the policy at that time. There is some doubt in my mind as to whether a policy prohibiting transfers actually existed, at least in writing, when the Embarcadero store opened in early 1977. The policy document produced in evidence herein bears a date some 7-1/2 months following the Embarcadero opening. That document has spaces to record superseded policies and the effective dates of such—those spaces appear blank on the page from the policy manual placed in evidence (Resp. Exh. 5). Richards, an experienced store manager who should be familiar with all company personnel policies, testified that a written policy existed 2-1/2 years before the date of the one submitted herein, yet no such document was introduced nor was its absence explained. Indeed, the policy Richards recited could arguably be interpreted by its terms not to preclude transfers between stores. Finally, Tobler asserted that a no-transfer policy was a major part of his sales development scheme; yet he testified as to his rationale to justify a policy, allegedly longstanding, which preceded him by a year. No one was produced to explain why the policy was originally conceived—it predated the arrival of the three top management personnel by 4, 5, and 12 months, respectively. Nor had its purpose ever been explained to Richards, who over nearly 6 years has managed three stores. All of these factors lead me to conclude that no clear policy precluding interstore transfers existed prior to the Embarcadero opening, and that it was 7 months after that opening before a policy to that effect was actually promulgated.

Several additional factors enhance the soundness of such a conclusion:

(1) When Respondent opened its Magnarama operation in a separate facility in 1975 (this operation—engaged in the sale of "overbought" items at reduced prices—was run as a department of Store 1[2]), it transferred Store 1 employees to that facility, and then transferred them back when Magnarama was closed in 1978.

(2) Nancy Nunes, Vicki Rae, and Ronna Schulkin were permitted to transfer to the Embarcadero store from the Oakland, California, store when the former opened in early 1977. An estimated four employees from other San Francisco stores of Respondent were not permitted to transfer to Embarcadero (it was this event which formed the basis for the 8(a)(3) charge filed in the Embarcadero dispute alluded to above—the administrative dismissal of that charge does not preclude me from discussing those aspects of that case litigated herein).

Respondent contends that each of the three above-named transferred employees falls within an exception to its no-transfer policy. Nunes, Respondent contends, transferred for more hours and thus received a promotion; it contends that Rae and Schulkin each had an "established San Francisco customer list." Respondent does not attempt to explain these transfers on the basis of geographic relocation, the one clearly delineated exception to its existing no-transfer rule (see Resp. Exh. 5) and, indeed, could not logically do so. Nor does Respondent's explanation of Nunes' transfer as a special circumstance hold much merit, for, *arguendo*, it is not unreasonable to assume, without deciding, that perhaps at least one of the four San Francisco employees who unsuccessfully sought transfer to Embarcadero had hoped to obtain longer

[2] Store 1, or the O'Farrell Street store, appears from the record to be the flagship of Respondent's San Francisco Bay area department stores.

working hours available there. Similarly, Respondent's explanations for the permitted transfers of Rae and Schulkin lack substantial merit.

(3) Union Representative Susan Monihan testified without contradiction or dispute that Elsa Lane had conceded in a May 1979 meeting that certain of the employees listed in General Counsel's Exhibit 17 (a list of interstore employee movement accompanied by Respondent's rationalizations therefor) were transfers or had been transferred. The lack of a specific denial on this point is particularly telling since that exhibit was the subject of much discussion in the instant litigation. In view of all of the above, the assertion that Respondent's policy prohibiting interstore transfer of hourly employees is longstanding becomes doubtful at best. At the very least, the administration of that policy has been inconsistent and perhaps even arbitrary.

2. The Post Street opening

Sometime during 1977 or early 1978, Respondent began formulating plans to establish a small store independent of its department stores which would be engaged in the sale of nothing but the various products of Italian designer Aldo Gucci.[3] Respondent had been selling Gucci's products from a boutique or department within its store on O'Farrell and Stockton Streets in San Francisco (Store 1) since sometime in the early 1970's; apparently the Company had and continues to have similar Gucci boutiques in various of its other department stores. On April 15, 1978,[4] Aldo Gucci and Respondent executed an agreement whereby Respondent was, *inter alia*, to open an independent or "freestanding" shop on Post Street in San Francisco dealing exclusively in Gucci products.

The Union first learned of the Company's plans for the freestanding Post Street Gucci store in mid-1978. After an employee of Store 1's Gucci department reported a rumor of the Post Street plans, Union Business Representative Susan Monihan requested a letter from the Company explaining the proposed Post Street Gicci store. In a June 13 letter to Monihan and Union Secretary-Treasurer Richard Williams, Elsa Lane, Respondent's director of employee relations, indicated that:

> . . . a division has been created which will probably be operating a Gucci store on Post Street . . . . I also understand that the Gucci department in our Downtown San Francisco store (#1) will remain open.

Also sometime during June, Monihan testified that she attended a board of adjustment meeting in a conference room of Respondent's headquarters building.[5] She testified that at this meeting, which was to deal with the grievance or grievances of employee Vincent Washington, she observed artists' renderings of the Gucci store that later opened on Post Street adorning the walls of the meeting room. Monihan testified without contradiction that:

> . . . during the course of the adjustment board [hearing], we had a caucus and the union took their caucus inside the conference room and the company left. That's when we first noticed the pictures. We looked at them very carefully and then there was a subsequent caucus in which the company asked the union to leave, and when we came back to reconvene the adjustment board hearing, there was brown paper over all the artists' renderings, covering them up.

Employee Lewis Silcox, who works in the Store 1 Gucci department, testified that he and other employees first learned of the planned Post Street Gucci store opening when telephoned by customers who had read about those plans in the column of San Francisco Chronicle writer Herb Caen.

Sometime during September Margaret McCoy, an employee in Store 1's Gucci department, apparently inquired about transferring to the new Post Street Gucci store. While there is no direct testimony on this point, McCoy apparently was told that she would have to resign her current position and be rehired with a new employment date in order to effect a transfer to Post Street. (See G.C. Exh. 7, a letter from Union President Walter Johnson to Elsa Lane alleging these facts.) McCoy's attempt to transfer led to the scheduling of a board of adjustment meeting where the Union apparently hoped to grieve the issue.

On October 8 a classified advertisement appeared in the Sunday San Francisco Chronicle-Examiner telling of full-time and part-time sales openings in "The New Gucci Shop Opening in Downtown San Francisco." The ad gave no further identification of the employer, but listed a telephone number to call for interview appointments. The number was to a Joseph Magnin COB extension; and, as the experience of Store 1 Gucci department employee Christine Azzopardi demonstrated (discussed in more detail *infra*), interested persons were to complete application forms and be interviewed at the COB.

Three union officials (Monihan, Secretary-Treasurer Williams, and President Johnson) and three members (each of whom was a Store 1 Gucci department employee) met with Lane and Ben Waud, Respondent's counsel at that time, to discuss the McCoy transfer grievance on October 10. The union representatives stated that the meeting was a formal board of adjustment hearing pursuant to the collective-bargaining agreement, but apparently Waud disagreed. Waud and/or Lane explained that the Post Street Gucci store was to operated by a separate division of the Company ("the Gucci Division and the Joseph Magnin Division, two separate organizations," Lane testified regarding her comments at this meeting) and that consequently the Union's contract with the Company would not and did not apply to the Post Street Gucci store. Lane then told the union delega-

[3] These products include leather goods, such as shoes, boots, handbags, and belts and scarves, jewelry, and other "ready-to-wear" apparel items.

[4] All dates hereinafter refer to 1978 unless otherwise stated.

[5] That building is located at 59 Harrison Street in San Francisco. The witnesses and the parties herein referred to it variously as the central office building or the central operations building of Joseph Magnin; all referred to it in short as the COB. I shall refer to it hereinafter as the COB.

tion that "it was our plan to not transfer hourly employees to that store." Waud maintained that transfers were not at issue because of the "separate corporation[s]," according to Monihan's uncontradicted testimony. Johnson then indicated that the Union's members had a right to transfer under the terms of the collective-bargaining agreement. The meeting ended in a deadlock on a vote to proceed to arbitration.[6]

The next day (October 11) Christine Azzopardi, one of the Store 1 Gucci department employees who had attended the previous day's meeting, went to the COB to complete an application form and be interviewed for a position at the Post Street Gucci store. Azzopardi had seen the classified advertisement in the previous Sunday's newspaper and, in response to that ad, had telephoned on October 10 to arrange an appointment to fill out an application form. Azzopardi testified that she dealt with Patti Bauer (now Craig) of the personnel office, and that the following took place:

> I was given an application. I filled half of it out and she glanced over to see how much I filled out and she noticed that I had worked for Joseph Magnin and she said oh, are you from the Las Vegas store and I said no, I'm from Store No. 1. She had said I'm sorry that you can't fill out this application and I had answered can I have that in writing, and at that point I stopped filling out the application and she said excuse me for a moment and she retrieved Elsa Lane, [who] was at a meeting at the time.

Azzopardi further testified that Lane emerged from her meeting, saw that Azzopardi had completed half of the application form, and then said (according to Azzopardi):

> Chris, you know the procedure, and I said yes. We had discussed it yesterday at an adjustment board meeting. She said you know the procedure, you're going to have to quit your job before you apply. And I said are you denying me the right to fill out this application. She said no, but for an interview, yes.

Lane testified to a slightly different version of their conversation:

> She was very angry that she—about the no transfer stance. I told her that we, as she knew from the meeting yesterday, would not be transferring people. She said do you mean you won't take my application and I said no, Chris, you are perfectly free to complete the application and leave it, I just want you to understand that we intend not to transfer people between the stores. . . .
>
> Q. During that conversation, did you tell her that she could complete an application but that she could not be interviewed?
>
> A. I did not say that. She said can I leave my application and I said you are perfectly free to leave the application, but our intent is not to transfer employees to that Post Street store.

While Lane's testimony on this score is more precise in that she probably did not say to Azzopardi, as the latter testified, "[Y]ou're going to have to quit your job before you apply," I find that, as to the substance and effect of Lane's comments, I am persuaded by Azzopardi's version. This conclusion is founded in large part on Lane's response to the following questions from counsel for the General Counsel on cross-examination:

> Q. Isn't it true that it would have been futile for any of the employer's union employees to apply for positions at Gucci without resigning first?
>
> A. No.
>
> Q. Employees could be considered for employment without resigning first?
>
> A. They could have left the application with me but, as I told Chris, we were not going to transfer hourly employees.
>
> Q. So it would have been a futile act to fill out an application because if you were employed by Joseph Magnin in a union store you weren't going to be considered unless you resigned first. The act of applying would have been a futile act, isn't that true?
>
> A. That's the interpretation that you are giving it, that it would be futile.
>
> Q. No, I want your interpretation. Don't you believe that the act of applying is futile when you cannot be considered for the position?
>
> A. If I were going to apply for a position for which I could not be considered, I would think that would be a futile effort, yes.

I conclude accordingly that the fact of the matter was that if Azzopardi wanted to work at Post Street, she could not be a current employee of Respondent—in effect, she would have had to resign her then-current employment and attempt to sign on as a new hire.

In addition to the events and incidents recounted above, at various times during 1978 (sometimes unspecified) several employees of Respondent's Store 1 Gucci department consulted supervisory personnel about the possibility of transferring to the soon-to-open Post Street Gucci store. The uncontradicted testimony of various employee witnesses shows the following:

(1) Sometime in the spring of 1978 Lewis Silcox asked Maria Manetti, then Respondent's Director of Gucci Operations, about transferring to Post Street. Manetti indi-

[6] The arbitration award underlying the instant litigation forms an important part of this Decision as will be seen *infra*, but it is convenient to discuss the arbitration procedures at this point. Under the collective-bargaining agreement, when an adjustment board vote on proceeding to arbitration deadlocks, either party may request arbitration after 14 days. After the requisite waiting time, the Union requested arbitration, and the parties agreed on Professor Joseph R. Grodin (now a judge of the California State Court of Appeals) as the arbitrator. Apparently the Company then backed out of the agreement to arbitrate, and the Union sought and obtained a state court order to compel arbitration. The arbitration then proceeded, with Arbitator Grodin rendering his award (which will be discussed in greater detail *infra*) on June 16, 1979, and a letter clarifying that award on September 4, 1979. Sometime thereafter the Union filed in California Superior Court a petition to confirm and Respondent filed a cross-petition to "correct and then confirm" the arbitrator's award; the court granted the petition to confirm and denied the petition to correct. Respondent has appealed those rulings, and consequently the matter is currently pending on appeal in the California state courts.

cated that she did not know what the procedure would be nor if there would be automatic transfers and she was, according to Silcox, "very vague." Sometime later Silcox asked Lillian Magnin, "the supervisory manager at that time on the fifth floor [of Store 1]," about transferring. Initially she "was quite vague, too"; when Silcox renewed his inquiry several weeks later Magnin told him that:

> . . . we would not be allowed to transfer and that if we wanted to work at the Post Street shop we would have to resign our present positions, thus losing all of our seniority with Joseph Magnin, in effect just to go to work for the same company, and even to apply for a position at Post Street we would have to resign our position.

(2) Cheryl Austin consulted Ila Adams, a personnel officer of Respondent, Keith Miller, Store 1' s operations manager, and Lillian Magnin about the possibility of transferring to Post Street. Austin testified that, during her meeting with those three supervisory personnel, she was told by Magnin and Adams that she would have to resign her position with Store 1 and reapply as a new hire to work at Post Street. Austin, who apparently held some type of low-level supervisory position herself at Store 1, in turn related the substance of this conversation to Store 1 employee Lewis Rusel. Rusel testified that he had considered applying for a job at Post Street until he was told by Austin that he would first have to resign his position at Store 1.

(3) Howard Ferrier was employed in Respondent's supply department at the COB when he learned of the Post Street plans in the fall of 1978. He asked Kurt Bryan and Patti Bauer, personnel officers who apparently were involved in screening applicants for the Post Street Gucci store, about the possibility of transferring to that facility. Bryan told Ferrier that he would have to resign his employment with Joseph Magnin to be considered for a position at the Post Street Gucci store.

(4) Mikio Hirata consulted Lillian Magnin sometime in 1978 about the possibility of transferring to Post Street. Hirata, too, testified that Magnin told him he would have to resign his job at Store 1 and then apply anew for a position at Post Street. Respondent does not contest the alleged agency or supervisory status of Maria Manetti, Lillian Magnin, Ila Adams, Kurt Bryan, or Patti Bauer-Craig. Nor did Respondent produce any of these individuals as witnesses to deny or contest the testimony of any of the employees who did appear. Accordingly, I infer that each of the conversations testified to did occur as recited *supra*. I find, therefore, that in each instance at least one of Respondent's agents or supervisory personnel told the employees who testified that the only method of "transferring" to the new Post Street Gucci store was to resign from their current position and apply as a new hire.

3. Subsequent events

Union Representative Monihan testified to a meeting she had with Harmon Tobler in January 1979. Tobler, now the president and chief executive officer of Respondent, was at the time of the meeting the vice president for personnel and sales development. Monihan testified that at this meeting, ostensibly held for the purpose of discussing the grievance of one Dorothy Patton, she brought up the subject of transfers. She testified that she told Tobler that the Company should not have a policy against transfers. Tobler's response, according to Monihan, was that Respondent would not have the no-transfer policy were it not for the pending dispute over the Post Street Gucci shop. Tobler disputed Monihan's account of their conversation in his testimony. He denied having stated there would not be a no-transfer policy but for the Gucci dispute and the forthcoming arbitration of that dispute; he maintained that his sales management philosophy favored salespeople's building a personal clientele and thus disfavored transfers between stores. Both witnesses appeared to testify in a straight forward, candid manner. Nonetheless, Monihan's testimony regarding the conversation was precise and unwavering on both direct and cross-examination, while Tobler's testimony on the point consisted of brief four-word answers to leading questions on direct examination. Notwithstanding Tobler's apparently rational business justifications for disfavoring a policy permitting transfers, and even though I am aware of the dangers inherent in the fact that Monihan's testimony is quite self-serving, the form of their respective testimony leads me to credit Monihan's version as the more accurate. Furthermore, I believe that my conclusions regarding the no-transfer policy as a whole, *supra*, serve to bolster my judgment on this particular credibility issue.

Sometime during the spring of 1979 the Union learned of a job opening at Respondent's store on Montgomery Street in San Francisco. Union Representative Monihan accompanied Sarah Hill and Rosa Bullock, both of whom had been laid off previously, to the Montgomery Street store to inquire of Store Manager Michael Richards about the opening. When the threesome met Richards, according to Monihan:

> Sarah asked Mr. Richards would he let her work there, would he let her transfer there, and Mike said I'd love to have you work for me, Sarah. You're a fantastic worker, I know you from when I used to work over at the Harrison Street building. But there is a policy in the union stores that the company won't let people transfer. He said I don't know why they have that policy, it's only in the union stores.

Richards denied saying that the no-transfer policy applied "only in the union, stores," but he did admit, "I said within the city [of San Francisco] stores." Richards then attested to his knowledge that Respondent's no-transfer policy applied throughout the Joseph Magnin system, but subsequently again testified that, when Monihan and the two employees had asked about transfers and where the policy applied, "I said the city stores." Richards then testified that, despite the applicability of the policy to all Joseph Magnin stores, "within the city San Francisco stores we have a special situation because we are a union operation." He testified that the situation was "special" only because of the fact that all of Re-

spondent's San Francisco stores and the COB are covered by union contracts while none of its other stores are unionized. Taken in whole, I find Richards' testimony to be less than forthright. While he frankly admitted to having told the employees and Monihan that the no-transfer policy applied "within the city stores," the rest of his testimony seemed to be designed in some way to cover tracks. While Richards may not have said that the policy applied "only in the union stores," it is clear that he did say "within the city stores"—the unmistakable implication being that the policy applied exclusively to the city stores, which in fact are the only union stores. Accordingly, I lend more credence to Monihan's version of the conversation.

4. Analysis and conclusions

The facts of the instant case must be analyzed under the basis of the Board's recent decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), wherein the Board formally established "a test of causation for cases alleging violations of Section 8(a)(3) of the Act." That test calls for counsel for the General Counsel to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor.'" Once that initial showing has been made, "the burden [shifts] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line, supra* at 1089.

However, before proceeding to a discussion of this case under the *Wright Line* analysis, I must deal with the Charging Party's motion to defer to the award of Arbitrator Grodin, which award underlies in many respects the instant litigation. The Board's decision in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), indicates that, where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act," the Board will defer to an arbitrator's award. *Spielberg, supra* at 1082. The so-called *Spielberg* doctrine was recently enhanced by the Board in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), wherein the Board stated, "[W]e will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight* further requires that "the party seeking Board deferral to an arbitration award . . . prove that the issue of discrimination was litigated before the arbitrator." *Id.* at 147.

In light of the above-enumerated standards, my examination of the arbitration establishes that the arbitrator's award herein is entitled to great weight. Arbitrator Grodin found that:

> . . . the Employer's no-transfer rule operated to preclude union employees from transferring from Store #1 to Post Street in part precisely because they are union employees and, therefore, to discriminate against them "on account of membership in . . . the Union" in violation of Section 3A of the agreement.

The arbitrator reached this determination after consideration of much of the same evidence that was presented in the instant litigation. Further, he followed the procedure which would be used in any Board determination following *Wright Line, supra*: He found first that the evidence presented by the Union was "sufficient to establish a *prima facie* case of improper motivation"; he then found not only that because of "significant gaps in the Employer's case" Respondent had failed to rebut the Union's initial showing, but also that the reasons adduced to justify the no-transfer policy failed to provide such a rebuttal. Finally, the arbitrator indicated that in rendering his award he relied by analogy on the policies of the Act as interpreted by the Board; my reading of the award confirms this assertion, no contrary showing has been attempted, and I find that, in accordance with *Spielberg*, arbitrator Grodin's decision "is not clearly repugnant to the purposes and policies of the Act" but that in fact it effectuates those policies.

Even were I not to place such great weight on the findings and conclusions of the arbitrator, I find that, in accordance with *Wright Line, supra*, counsel for the General Counsel has made a *prima facie* showing of improper motivation which Respondent has failed to rebut. This conclusion is based upon the following factors:

Internal correspondence between top management officials in the fall of 1977 shows that Respondent was interested in cutting commissions and labor costs incurred via the sale of Gucci products. The director of labor relations at that time, however, noted that the Union presented an obstacle to those interests. I infer that also at or about this time Respondent was involved in business negotiations and planning for the freestanding Gucci store on Post Street because the agreement between Joseph Magnin and Gucci regarding that store was executed within the next 5 months. A March 15, 1978, memorandum of Maria Manetti, then the director of Gucci operations for Respondent, extolled the virtues of operating an exclusive "quality" specialty shop without a union; labor costs could be significantly reduced and there would be no restrictions on "the freedom of management policies." Then President Raskin testified that the decision to open Post Street nonunion was not based solely on the Manetti memorandum; yet, he admitted that, at the time the decision was being made, Manetti's recommendations formed at least part of the decision-making proccess. Indeed, Raskin testified that Manetti was only "one of many" involved in the decision who advocated opening the Post Street Gucci store on a nonunion basis.

In view of Respondent's expressed desire to open its Gucci store on Post Street sans a union, I find that from February 1977 until Post Street opened in November 1978, the following scenario occurred: Respondent decided not to extend automatically the Union's contract to its new Embarcadero store, a break from its apparent past practice (the contract was automatically applied when the Stonestown, Fox Plaza, and Montgomery Street stores opened, respectively). In an apparent effort to dissuade the Union from obtaining a majority at the Embarcadero Store, it prevented at least four union em-

ployees at San Francisco stores from transferring there while at the same time permitting at least three nonunion employees from the Oakland store to so transfer. This occurred in conjunction with the announcement, for the first time, of a policy prohibiting the interstore transfer of hourly employees. After the Union disputed this policy, and contemplating the opening of its Post Street Gucci store, Respondent actually promulgated its "long-standing" no-transfer policy; I think it is no coincidence that the policy was promulgated at or about the same time that planning was under way for the Post Street Gucci store, *viz*, during the fall of 1977. I find it significant that, as discussed *supra*, no one was called who testified (or who could have testified) as to the original reasons for promulgating the no-transfer rule; nor were the rule's antecedents (if any) produced, and I infer that, prior to the Embarcadero dispute (and its culmination in the promulgation of the no-transfer rule on September 26, 1977), no policy specifically prohibiting interstore transfers existed. *Colorflo Decorator Products Inc.*, 228 NLRB 408 (1977). Thereafter, with its no-transfer policy in hand and intending to open a nonunion store, Respondent through its agents and supervisors told any and all of its San Francisco employees who, upon learning of the plans for the Post Street Gucci store, sought to transfer to that facility that they could not do so unless they quit their current employment with Joseph Magnin.

I find this quit-and-reapply requirement to be remarkably similar to that found in *Coated Products, Inc.*, 237 NLRB 159 (1978). While that case involved the closing entirely of one plant and the subsequent reopening of a new one, the remaining facts are quite relevant to the situation herein. Employees at the old plant who desired to be transferred to the new one were required to resign from their positions and make new applications; this requirement was imposed even though there had been no change in the corporate structure of the employer. In addition, nonunit employees were permitted to transfer to the new plant without inhibition. Those factors, along with other evidence tending to show union animus, led to the conclusion that the respondent sought to "depress the union component in the employee population at [the old plant]." *Coated Products, supra* at 167. Accordingly, Respondent's failure to permit transfers to the new facility was found to be a violation of Section 8(a)(3). *Coated Products* is quite instructive with regard to the present case. Herein employees of the San Francisco stores were required to resign and reapply to effect a transfer despite the fact that the Post Street Gucci Store is owned and operated by Respondent. In addition, there is some evidence herein of at least inconsistent application of Respondent's claimed no-transfer policy and clearly the fact that Respondent sought to operate the Post Street Gucci store without having to deal with the Union cannot be disputed.

Several additional factors support these conclusions. In January 1979 then Vice President Tobler told Monihan that there would not be a policy prohibiting transfers but for the pending Gucci dispute. While Tobler denies this assertion, I have credited Monihan's account. A few months later, the Montgomeny Street store manager, Richards, told two employees seeking a transfer to his store that company policy prohibited such transfers in the San Francisco stores, the only stores in Respondent's chain which are unionized. He may even have said that the policy applies only in the union stores. In any case, it is clear from my findings, *supra*, that he did not know why the policy existed, but knew only that he was not to permit union member employees to come from another store to the one he managed. Finally, on at least three occasions Respondent attempted to conceal its plans for the Post Street Gucci store in an effort to prevent employees from seeking transfers to what it hoped would be a nonunion shop. It told union representatives in October that Gucci was a separate employer, even though Respondent owns and in every respect operates the Post Street Gucci store. Its advertisement soliciting applicants for the Post Street Gucci store bears no identification of the owner/operator of that shop,[7] and it attempted to conceal artists' renderings of the proposed Gucci shop from union representatives during a board of adjustment meeting.[8]

In summary, therefore, I conclude that the findings and award of the arbitrator are entitled to great weight. I conclude that even absent consideration of the underlying arbitration the General Counsel has established a *prima facie* case supporting an inference of unlawful motivation and that Respondent has failed to rebut this showing. Accordingly, I find and conclude that, by adopting its policy prohibiting the interstore transfer of hourly employees and by prohibiting the transfer of such employees to its Post Street Gucci store because of their union affiliation and because of its desire to run Post Street nonunion, Respondent has violated Section 8(a)(3) and (1) of the Act.

B. *The 8(a)(5) Allegations*

The complaint alleges that but for the unfair labor practices of Respondent, as found *supra*, the Union would have represented a majority of Respondent's employees at its newly opened Post Street Gucci store. The complaint further alleges that since on or about October 1978 Respondent has unlawfully refused to recognize the Union as the bargaining representative of its employees at Post Street.[9] For the reasons that follow, I conclude that these allegations that the Respondent has violated Section 8(a)(5) of the Act lack substantial merit.

---

[7] Cf. *Karl Kallman d/b/a Love's Barbeque Restaurant No. 62; Love's Enterprise, Inc.*, 245 NLRB 78, fn. 10 (1979), a successorship situation in which hiring was concealed from the union and its members in part by use of an "unmarked" newspaper advertisement.

[8] As to this latter point, Respondent called no witnesses to testify as to this occurrence. I infer that it happened according to the account of the witness for the General Counsel. *Colorflo Decorator Products, supra* at 410.

[9] I find that, insofar as it is relevant, the Union first requested recognition as representative of the Post Street employees on September 12. On that date Union President Walter Johnson wrote to Elsa Lane requesting extension of the contract to the new facility by operation of sec. 1 of that agreement. In that letter, he also requested an adjustment board meeting to discuss the transfer issue. The record makes no clear mention of any subsequent recognition demands, presumably, such a demand was renewed at the board of adjustment meeting in October, and hence the date of refusal to recognize which is recited in the complaint.

The Union claims representative status on the basis of section 1 of the parties' collective-bargaining agreement. The parties have stipulated and the arbitrator found that section 1 is a valid "after-acquired-stores" or additional stores clause under Board law. *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975). Under *Kroger*, the Board construes such clauses to be contractual waivers of an employer's right to petition for a Board election upon a request for recognition; but *Kroger* and its progeny also clearly show that such clauses require recognition only upon proof of majority status by a union. As the Board stated, in a situation such as the instant one:

> [t]he principles of accretion do not resolve the issue . . . inasmuch as the stores in question have a sufficient separate existence to constitute separate appropriate units. . . . [T]he Board has held that "additional store clauses" are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative. [*Kroger, supra.*]

I can find nine employees of Respondent who, at the very least, expressed some interest in transferring from their jobs to positions at the new Post Street facility. Thus, Christine Azzopardi went so far as to attempt to complete an application form and obtain an interview. Margaret McCoy initiated the grievance over the transfer issue that resulted in the arbitration by Professor Grodin. Lewis Silcox, Howard Ferrier, Mikio Hirata, and Cheryl Austin individually consulted supervisors or personnel officers about the possibility of transferring; each was told they would not be able to do so without resigning, and I find, accordingly, that Respondent discouraged each of them from even attempting to apply. Employee Austin then transmitted the substance of her conversations to employees Lewis Rusel, James Murphy, and Jack Smith; Rusel testified that consequently he was discouraged from attempting to apply for a transfer, and I conclude that Murphy and Smith were similarly so discouraged. Various of the employee witnesses testified that other of their fellow employees were discouraged from inquiring about transfers, to Post Street; but since no others were named or testified, I may not include them in that class of employees who have at least expressed an interest in transferring. Similarly, while Terry Dean and Geraldine Korss accompanied fellow employee Margaret McCoy to the October 10 board of adjustment meeting where McCoy's transfer grievance was discussed, to conclude that their presence at that meeting indicated an interest in transferring would be an impermissible indulgence in speculation.

Neither the complaint nor the brief from counsel for the General Counsel make any allegation as to the employee complement at the Post Street Gucci store. Nor is there any testimony giving an exact indication of the size of that complement. My review of the business documents placed in evidence indicates that Respondent opened the Post Street Gucci Store in November with 21 employees. From that time until the selling period ending April 7, 1979, I cannot determine that the number of employees ever dropped below 18. Under such circumstances, even had all nine been permitted to transfer, a majority would not have been obtained.[10]

Furthermore, counsel for the General Counsel has adduced no evidence that, even absent Respondent's discriminatory no-transfer rule, all nine of the above-mentioned employees would have transferred to Post Street. There is no showing that any or all of them had acquired sufficient seniority under the contract. Nor does the record show whether, following any reduction in the size of the employee complement, any or all of the nine had seniority sufficient to cause their retention at Post Street.

Consequently, the requirements of *Kroger* have not been fulfilled—the Union did not offer and I find that it would have been unable to submit proof that it represented a majority of the employees at the Post Street Gucci store. Under this standard, then, the additional stores clause could not operate to apply the parties' collective-bargaining agreement to that facility.

Nonetheless, counsel for the General Counsel urges that a bargaining order should issue. He argues, by analogy to a line of the Board's successorship cases,[11] that but for Respondent's unfair labor practices under Section 8(a)(3) the Union would have had a majority at the Post Street Gucci store; that uncertainties in ascertaining whether a majority existed at the Post Street Gucci Store, being uncertainties which have arisen due to Respondent's unlawful conduct, must be resolved against the wrongdoer; and that the wrongdoer must not be permitted to benefit from its illegal acts. While at first blush this argument is quite attractive, I find that the reliance of counsel for the General Counsel on these successorship cases is inapposite.

First, all of the cases cited by counsel for the General Counsel may be distinguished factually. In each case the successor employer refused to rehire the employees of its predecessor in an already established bargaining unit. In this case there is no preexisting bargaining unit. Obviously, Post Street is a new facility; indeed, under the principles of both *Kroger, supra*, and the Board's accretion decisions, Post Street is of arguably sufficient separate existence to constitute a separate appropriate unit. Cf. *W. C. DuComb West A Division of W. C. DuComb Co., Inc.*, 239 NLRB 964 (1978), and cases cited therein.

An even greater distinction, however, is the fact that in each of the successorship cases the union majority was clearly established before the business involved changed ownership. Here, of course, no previous majority status was or could have been shown.

---

[10] In its brief the Charging Party, after its own analysis of Respondent's productivity reports, avers that "the normal complement of selling employees is approximately 16," and that, according to Respondent's testimony, the Post Street employee complement also included 2 to 3 stock employees. The Union's claim of majority status cannot be based on an average number of employees for the year nor on its own assertion of the "normal complement," for the fact remains that, according to this record, it could not have had a majority at the time or soon after it requested recognition. Furthermore, my conclusions *infra* apply here as well.

[11] *Foodway of El Paso, A Division of Kimbell Foods, Inc.*, 201 NLRB 933 (1973); *Crawford Container, Inc.*, 234 NLRB 851 (1978); *Karl Kallman d/b/a Love's Barbeque Restaurant No. 62, supra.*

Of paramount importance is the right of all of the employees at the Post Street Gucci store "to have a say in the selection of their bargaining representative." *Kroger, supra*. The granting of a bargaining order in this instance, requiring Respondent to recognize the Union as the exclusive representative of its Post Street employees, may operate to effectively disenfranchise those employees by reason of a contract (and its additional stores clause) for which they did not bargain. Cf. *Melbet Jewelry Co., Inc., and I.D.S.—Orchard Park Inc.*, 180 NLRB 107, 109 (1969).

A useful analogy may be drawn here to cases where the Board has issued bargaining orders in the context of a union's organizational campaign. In those exceptional cases marked by pervasive and outrageous employer unfair labor practices, a bargaining order may properly issue, but only where the employer's illegal conduct has dissipated the union's majority. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Thus the bargaining order is a remedy designed to restore the *status quo ante*. However, where, as herein, the union has never obtained a showing of majority support—indeed, the Post Street employees have apparently never had any opportunity to demonstrate one way or another their sentiments regarding the Union—a bargaining order does not serve to restore the *status quo ante*. *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979).

The Board concluded in *United Dairy Farmers, supra*, that the imposition of a bargaining order in a case where no majority support was shown, and even where the employer's 8(a)(3) and (1) violations precluded an unencumbered election, presented a substantial risk of imposing a union on nonconsenting employees. No substantial remedial interest was found to justify imposition of such an order. I think that the same risks—of imposing the Union on nonconsenting employees—are attendant in this case. Futher, I do not think that the unfair labor practices herein are so pervasive and egregious as to prevent a free and fair election should either of the parties petition for one.

Thus, I conclude that *Kroger* and *United Dairy Farmers* may be taken together to find that, under circumstances such as those herein, an additional stores clause cannot apply absent a showing of majority status, nor will an "anticipatory" majority be presumed so as to deny employees of a new, arguably separately appropriate unit or facility an opportunity to choose a bargaining representative.

Accordingly, I conclude that the evidence fails to show that Respondent has violated Section 8(a)(5) of the Act.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Joseph Magnin Company, Inc., set forth in section IV, A, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Joseph Magnin Company, Inc., is an employer within the meaning of Section 2(2) of the Act engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein the Union has been the exclusive representative of all of the San Francisco employees of Respondent, as designated in section 1 of the parties' collective-bargaining agreement and the appendixes thereof, except for those employees employed by Respondent at its Gucci store at 253 Post Street, San Francisco, California.
4. By adopting a no-transfer policy for its hourly employees designed to discriminate against employees on the basis of their union affiliation and by refusing to permit interstore transfers of employees because of their union affiliations, Respondent Joseph Magnin Company, Inc., has violated and is violating Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent Joseph Magnin Company, Inc., has not violated the Act in any other manner.

THE REMEDY

Having found that Joseph Magnin Company, Inc., has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act. With regard to the latter, I note first that the Charging Party has alleged that employees of the Store 1 Gucci department lost earnings as a result of the Post Street opening and the prohibition against their transfer there. I note also that this allegation was made in the arbitration proceeding, and that Arbitrator Grodin was unable to reach a definitive conclusion on its merits. In this light, I find that determinations regarding any backpay owed discriminatees herein may be deferred to the compliance stage of this proceeding. For as Mr. Justice Frankfurter noted in his concurring opinion in *N.L.R.B.* v. *Deena Artware, Inc., et al.*, 361 U.S. 398, 412 (1960), the separation of the finding that an employer's conduct violated the Act from the determination of the amounts of backpay owing is "an eminently reasonable method for administering the Act." See also *The Torrington Company* v. *N.L.R.B.*, 545 F.2d 840, 842 (2d Cir. 1976), and *The Florsheim Shoe Store of Pittsburgh, Pennsylvania, et al.* v. *N.L.R.B.*, 556 F.2d 1240, 1247 (2d Cir. 1977), for cases where issues involving the scope of the remedy were deferred to the compliance stage. Therefore, it is unnecessary at this point to determine precisely the employees so affected according to the Charging Party's allegations and the amounts of backpay to which each may be entitled. Similarly, I defer the determination of precisely which employees would have been transferred but for the unlawful discrimination to the compliance stage of this proceeding.

Having found that Respondent illegally refused to transfer union members to its Post Street facility, I shall recommend that Joseph Magnin Company, Inc., be ordered to offer immediate transfer to those employees who would have transferred but for the unlawful discrimination, as determined in the compliance stage of this proceeding, to the Post Street Gucci store, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, anyone who may have been hired or assigned to perform the work to which the discriminatees would have been assigned. Additionally, Joseph Magnin Company, Inc., will be required to make whole any such discriminatees for any loss of earnings they may have suffered by reason of the unlawful refusals to transfer, with interest on the amounts owing to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and with deductions for interim earnings as prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on other grounds 322 F.2d 913 (9th Cir. 1963).

[Recommended Order omitted from publication.]